Filed 5/25/12 Flores v. City of Southgate CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FRANCISCO FLORES, Plaintiff and Appellant, v. CITY OF SOUTH GATE et al., Defendants and Respondents.	B234931 (Los Angeles County Super. Ct. No. VC057573)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed in part and reversed in part.

Nicholas Weimer for Plaintiff and Appellant Francisco Flores.

AlvaradoSmith and Raul F. Salinas for Defendants and Respondents City of South Gate and Angel Colon.

No appearance for Defendant and Respondent Tweedy Mile Association.

Francisco Flores appeals from the judgment dismissing his complaint after the court sustained defendants' demurrers without leave to amend. We reverse as to the cause of action for violation of civil rights and otherwise affirm.

PROCEEDINGS BELOW

Construed liberally (Code Civ. Proc., § 452), Flores's second amended complaint alleges in relevant part:

A. Violation of Civil Rights (42 U.S.C. § 1983).

Flores is the owner of Nicky's Soccer Center in the defendant City of South Gate. Defendant Angel Colon is the owner of a competing business in the city and is a member of the city planning commission.[1]

In February 2010, the City cited Flores for painting the front of his store blue and gold in violation of a city ordinance specifying that the colors on commercial buildings be "earth tones and brown." After receiving the citation Flores sought a variance from the city planning commission and was denied. At the hearing on the variance "defendant Colon informed plaintiff that 'he was not going to allow plaintiff to have the variance.'" In May 2010, Flores repainted his store to comply with the city ordinance.

Flores later learned that several other commercial buildings in the city did not comply with the required color scheme including the blue building that houses defendant Colon's competing soccer business.

Flores's complaint also alleges that the city has not allowed him to promote his business in ways that other businesses in the city are "routinely allowed" such as having balloons at his store to promote a sale, having an electric sign in his store window and placing advertisements in the window. He further alleges that the City allows Colon to violate city ordinances "with impunity," including ordinances regulating the color of

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[1] Flores does not appeal from the judgment as to a third defendant, Tweedy Mile Association.

buildings and the number of parking spaces, "in an attempt to destroy plaintiff's business and gain unfair advantage in competing with plaintiff's business."

Based on these allegations Flores claims that "Colon . . . and other agents of the City of South Gate . . . are discriminating against plaintiff in an effort to drive plaintiff out of business and give defendant Angel Colon every advantage in competing with plaintiff" in violation of plaintiff's right to equal protection of the law under the United States and California Constitutions.

B. Political Reform Act (Gov. Code §§ 81000 et seq.)

Flores alleges that as a member of the city planning commission Colon has failed to disqualify himself regarding issues that effect his business and Flores's competing business, including Flores's application for a variance to retain his blue and gold building. In addition, Flores alleges, Colon purchased the property where his business is located from the City "for far below fair market value" and has obtained exemptions from city business ordinances including the required number of parking places and building color requirements. Flores contends that Colon's conduct violates Government Code section 87100 which prohibits a government official from using his official position to influence a government decision in which he has a financial interest.

Flores also alleges that Colon has failed to file a statement of economic interest as required by Government Code sections 87202-87203 disclosing his interest in his business that competes with Flores's business.

C. Intentional Infliction Of Emotional Distress

Finally, Flores alleges that the conduct of Colon and the City described above "was malicious, despicable, and extreme and outrageous" and done with the intent to, and did, in fact, cause Flores emotional distress resulting in pain and suffering and medical bills.

DISCUSSION

I. STANDARD OF REVIEW

When a demurrer is sustained without leave to amend we review the complaint de novo to determine whether, liberally construed, it states a cause of action under any conceivable theory, or could be amended to do so. (Code Civ. Proc., § 452, *Nutmeg Securities, Ltd. v. McGladrey & Pullen* (2001) 92 Cal.App.4th 1435, 1441.)

As we shall explain below, the trial court erred in sustaining the demurrer to Flores's cause of action under the federal Civil Rights Act, 42 U.S.C. section 1983, because the complaint alleges invidious discrimination against him in the enforcement of city ordinances and neither the doctrine of sovereign immunity or exhaustion of judicial remedies applies here. The court properly sustained the demurrers to the other causes of action.

II. FLORES STATES A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 FOR VIOLATION OF HIS RIGHT TO BE FREE FROM DISCRIMINATORY ENFORCEMENT OF CITY ORDINANCES.

Flores brings his first cause of action under 42 U.S.C. section 1983 which states in relevant part that "[e]very person, who under color of law of any . . . ordinance . . . subjects or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

To establish a claim under section 1983 a plaintiff must prove that the defendants deprived him of a right secured by the Constitution or laws of the United States (*Manta Management Corp. v. City of San Bernardino* (2008) 43 Cal.4th 400, 407), the persons committing the deprivation acted under color of law (*ibid.*), and, in a complaint alleging selective enforcement, that the defendants practiced a conscious pattern of purposeful discrimination (*Squaw Valley Development Co. v. Goldberg* (9th Cir. 2004) 375 F.3d 936, 944).

Flores's complaint alleges a cause of action under section 1983. It states that Flores and Colon are business competitors—both selling soccer equipment in stores in the City of South Gate; that Colon, a member of the South Gate planning commission, and the City are depriving him of his right to equal protection of the laws by engaging in a pattern and practice of invidious discrimination in which city ordinances are enforced against him but not against Colon; and that this selective enforcement is done with the intent "to drive plaintiff out of business and give [Colon] every advantage in competing with plaintiff." (Cf. *Esmail v. Macrane* (7th Cir. 1995) 53 F.3d 176, 180 [complaint alleging defendants engaged in "spiteful effort" to "get" plaintiff for reasons unrelated to any legitimate governmental objective stated cause of action under section 1983].)

Colon and the City demurred to this cause of action on the grounds that a public entity is not liable for an injury caused by the denial of a permit (Gov. Code § 818.4) nor for its failure to enforce an ordinance (Gov. Code § 818.2). They repeat those arguments on appeal. It is well-settled, however, that state law immunities do not override a section 1983 cause of action. (*Martinez v. California* (1980) 444 U.S. 277, 284.)

Defendants also argue that Flores's section 1983 cause of action fails because he did not exhaust his "administrative remedy." Specifically, they contend that Flores did not seek a writ of mandate to review the City's denial of his request for a variance from the City's color ordinance. This argument fails for two reasons.

First, defendants confuse exhaustion of "administrative remedies" with exhaustion of "judicial remedies." A plaintiff is not required to exhaust state administrative remedies before bringing an action under section 1983. (*Damico v. California* (1967) 389 U.S. 416, 417.) Failing to exhaust state *judicial* remedies for administrative actions, however, results in the administrative agency's decision becoming final for purposes of future litigation, including an action under section 1983. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70-71.) For example, if an administrative decision found that an agency acted against the plaintiff for neutral, non-discriminatory reasons and the plaintiff did not challenge that finding by a petition for administrative mandamus, the plaintiff

would be barred from claiming in a subsequent lawsuit that the agency acted for discriminatory reasons. (*Id*. at p. 71.) Based on the arguments presented and the opinions cited by defendants in this case, it appears that they are contending Flores failed to exhaust his *judicial* remedies by not bringing a petition for a writ of mandate to challenge the denial of his request for a variance from the City's building color ordinance and that decision is now final. If this was an action alleging the unconstitutional denial of a variance, Flores's failure to exhaust his judicial remedy might be of some consequence. But Flores is not challenging the denial of his request for a variance; he is claiming he never would have had to seek a variance in the first place if defendants had not selectively enforced the ordinance against him.

Second, unlike the plaintiff in *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 644, the case relied on by defendants, Flores's section 1983 action does not challenge the building color ordinance on its face or as applied. Rather, as discussed above, he challenges the discriminatory or selective enforcement of the building color ordinance as well as ordinances regulating electrical signage and window advertisements among others. His complaint is not that Colon and the City denied his request for a variance from the color ordinance. His complaint is that no other businesses even have to ask for variances because the City allows them to paint their buildings any color they want. He further alleges that Colon and the City enforce ordinances against him that they enforce against no one else "in an attempt to destroy plaintiff's business" and give defendant Colon an "unfair advantage in competing with plaintiff's business." The merits of Flores's request for a variance to paint his building blue and gold—which is the only issue that would be before the court in a mandamus proceeding—have nothing to do with Flores's cause of action under section 1983.

III. FLORES'S CLAIM THAT COLON FAILED TO FILE A PROPER FINANCIAL STATEMENT FAILS BECAUSE FLORES DID NOT FILE A REQUEST WITH THE CIVIL PROSECUTOR TO COMMENCE AN ACTION ON THAT BASIS

Flores alleges that Colon failed to file a statement of economic interest as required by Government Code sections 87202-87203 disclosing his interest in his business that competes with Flores's business.

Government Code section 87202, subdivision (a)[2] states in relevant part: "Every person who is elected to an office specified in section 87200 [which includes members of planning commissions] shall, within 30 days after assuming office, file a statement disclosing his or her investments and his or her interests in real property held on the date of assuming office[.]" Section 87203 requires the same reports to be made annually so long as the person continues to hold office. Failure to comply with these filing requirements may subject the government official to liability in a civil action "for an amount not more than the amount of the value not properly reported." (§ 91004.)

Before a private person can file a civil action under section 91004, he "must first file with the civil prosecutor a written request for the civil prosecutor to commence the action." (§ 91007, subd. (a).) Neither Flores's complaint nor the record on appeal show that Flores complied with section 91007.

IV. FLORES FAILED TO REQUEST THE TRIAL COURT'S PERMISSION TO SEEK INJUNCTIVE RELIEF WITHOUT FIRST FILING A COMPLAINT WITH THE FAIR POLITICAL PRACTICES COMMISSION

Flores alleges that Colon failed to disqualify himself from hearings before the planning commission that adversely effected Flores's competing business. Flores further alleges that Colon used his position on the planning commission to purchase city property "for far below fair market value" and to obtain exemptions from city business ordinances including the required number of parking places and building color

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[2] Future statutory references are to the Government Code.

requirements. Flores contends that Colon's conduct violates section 87100 which prohibits a government official from using his official position to influence a government decision in which he has a financial interest. A violation of section 87100 may expose the government official to a civil penalty (§ 91005, subd. (b)) and injunctive relief (§ 91003, subd. (a)).

Before a private person can bring an action for a civil penalty under section 91005, subdivision (b), however, he must first file with the civil prosecutor a written request for the civil prosecutor to commence the action just as in the case of failure to file a financial statement discussed above. (§ 91007, subd. (a).) A different requirement applies to a private person seeking injunctive relief regarding an official's conflict of interest. When injunctive relief is sought, the plaintiff must seek the trial court's permission to proceed with the complaint without first filing a complaint with the Fair Political Practices Commission. (§ 91003, subd. (a).) As previously discussed, Flores's complaint does not allege, and the record does not show, compliance with section 91007, subd. (a)—a request that the civil prosecutor commence an action. Therefore, he cannot seek a civil penalty for Colon's alleged conflict of interest. Flores also failed to request the trial court to exercise its discretion under section 91003, subdivision (a) as to whether Flores should be required to file a complaint with the Political Practices Commission. Therefore, he cannot seek injunctive relief under section 91003, subdivision (a).

V. FLORES'S CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FAILS BECAUSE DEFENDANTS' ALLEGED CONDUCT IS NOT "EXTREME AND OUTRAGEOUS" AS A MATTER OF LAW

A cause of action for intentional infliction of emotional distress requires "'extreme and outrageous conduct'" by the defendants. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) To be outrageous, conduct "must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid*.) A court may determine as a matter of law whether the facts pled in a complaint meet that requirement. (*Id*. at p. 210.) Selective enforcement of city ordinances against Flores does not, as a

matter of law, rise to the level of such extreme malfeasance "as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid*.)

DISPOSITION

The judgment is reversed as to the cause of action for violation of civil rights. In all other respects the judgment is affirmed. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY. J.